I.O.O.F. Home of Ohio, Inc. *and* General Teamsters, Sales and Service and Industrial Union, Local 654, an affiliate of the International Brotherhood of Teamsters, AFL–CIO. Case 9–CA–32556

January 24, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING, FOX, AND HIGGINS

Upon a charge filed January 26, 1995, by the Union, the Regional Director for Region 9 issued a complaint September 1, 1995, against the Respondent, alleging that the Respondent engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act. Copies of the complaint and notice of hearing were served on the Respondent and the Charging Party.

On March 8, 1996, on the basis of an all-party stipulation, the parties filed with the Board a motion to transfer the instant proceeding to the Board without a hearing before an administrative law judge and submitted a proposed record consisting of the formal papers and parties' stipulation of facts with attached exhibits. On April 11, 1996, the Executive Secretary of the Board issued an order granting the motion, approving the stipulation, and transferring the proceeding to the Board. Thereafter, the General Counsel, the Charging Party, and the Respondent filed briefs.

The National Labor Relations Board has considered the stipulation, the briefs, and the entire record of this proceeding, and makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, engaged in the operation of a nursing home at Springfield, Ohio, annually derives gross revenues in excess of $100,000 and purchases and receives at its Springfield, Ohio facility goods valued in excess of $10,000 directly from points outside the State of Ohio. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is a health care facility within the meaning of Section 2(14) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The issue is whether the Respondent violated the Act by withdrawing recognition from and refusing to bargain with the Union as the certified representative of the Respondent's licensed practical nurses (LPNs).

A. *Facts*

On July 14, 1994, the Union filed a representation petition in Case 9–RC–16418, seeking to represent the Respondent's LPNs. After first demanding a hearing to demonstrate that the LPNs were supervisors under *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994), the Respondent withdrew its request for a hearing and consented to an election in which it stipulated to the following appropriate collective-bargaining unit:[1]

> All licensed practical nurses of the Employer at its Springfield, Ohio facility, excluding non-LPN personnel, supervisors, and guards as defined in the Act.

The Union won the August 25, 1994 election, and the Respondent filed no objections. On September 2, 1994, the Union was certified as the LPNs' bargaining representative. On January 24, 1995, after having participated in several bargaining sessions, the Respondent notified the Union that it was withdrawing recognition because it had "reconsidered" the status of the LPNs and believed them to be supervisors. On January 26, 1995, the Union filed the instant charge.

In February 1995 the Respondent filed a unit clarification petition in Case 9–UC–401, asserting that the bargaining unit consisted of supervisors. In April 1995 a 2-day hearing was held. In June 1995 the Acting Regional Director issued an order dismissing the petition on the ground that the Respondent was estopped from raising the supervisory issue.

On September 1, 1995, the instant complaint issued. On October 2, 1995, the Board denied the Respondent's request for review of the Acting Regional Director's June 1995 order, but solely on the basis that the instant unfair labor practice proceeding raises the same issue presented by the unit clarification petition. See *Al J. Schneider & Associates*, 227 NLRB 1305 (1977).

B. *The Parties' Contentions*

The General Counsel and the Charging Party contend that the Respondent is barred from raising the supervisory issue because that issue could have been litigated in the July 1994 representation proceeding, and therefore the Respondent's withdrawal of recognition and refusal to bargain is unlawful. The Respondent contends that it should not be barred from raising the supervisory issue.[2]

[1] The Respondent executed a "Stipulated Election Agreement" in which it agreed, inter alia, that "a hearing is waived."

[2] Alternatively, the parties argue that the Board can decide the supervisory issue on the merits based on the record in the unit clarification proceeding, which the parties' stipulation makes a part of the record in this proceeding. Given our finding that the Respondent is barred from litigating the supervisory issue, we find it unnecessary to address the parties' alternative arguments.

C. *Analysis*

It is axiomatic that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding.[3] See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). In the July 1994 representation proceeding, although well aware of its right to litigate the supervisory issue under *Health Care & Retirement*, supra, the Respondent waived a hearing and consented to an election in which it stipulated that its LPNs constituted an appropriate bargaining unit. Because the supervisory issue could have been litigated in the prior representation proceeding,[4] we find that the Respondent is barred from raising the issue now.

As the Respondent acknowledges, there is ample Board and court precedent holding that a respondent is barred from challenging the validity of a union's certification based on a belief that unit members are statutory supervisors where the respondent failed to raise the issue during the representation proceeding.[5] The Respondent nonetheless, relying on *Oakland Press*, 266 NLRB 107 (1983), enfd. 735 F.2d 969 (6th Cir. 1984), cert. denied sub nom. *Teamsters Local 372 v. NLRB*, 470 U.S. 1051 (1985), seeks to raise the issue. We do not agree with the Respondent's reading of *Oakland Press*.

In *Oakland Press*, the union filed a petition to represent certain individuals whom the employer and the union agreed were statutory employees. The Regional Director, refusing to approve a consent-election agreement because he believed the individuals at issue were supervisors, submitted the question to the Board. Before the Board ruled, the union withdrew the petition. The union then filed a petition with the state commission, which, after an election, certified the union. The employer subsequently refused to bargain with the union on the grounds that the individuals in question were supervisors. The union filed an unfair labor practice charge with the Board.

It is true the Board in *Oakland Press* held that the respondent was not estopped from raising the supervisory issue "regardless of earlier positions." That statement, however, must be read in context. Neither the Regional Director nor the Board had ruled on the supervisory issue in the representation proceeding, which was not completed because the union withdrew the petition. Therefore, the principle precluding relitigation of matters that were or could have been litigated in a prior representation proceeding was not implicated. In contrast, as the Respondent here realizes, in the July 1994 representation proceeding the Respondent had an opportunity to litigate the supervisory issue but chose not to do so and the proceeding concluded with a certification that the Respondent did not appeal.[6]

We see no conflict between *Oakland Press*, which emphasizes that acts of parties and other agencies cannot override the Board's obligation to comply with the Act, and the *Pittsburgh Plate Glass* rule, which discourages piecemeal litigation of representation matters once they have been or could have been litigated. See *Bravos Oldsmobile*, 254 NLRB 1056, 1058–1059 (1981) (concurring opinion).

In sum, the Respondent has offered to produce no newly discovered and previously unavailable evidence and there are no special circumstances that would justify relitigation of the supervisory issue. Therefore, the Respondent is not entitled to litigate an issue that could have been litigated in the July 1994 representation proceeding.[7] Accordingly, we find that the Re-

[3] We recognize that supervisory issues may be relitigated in cases considered unrelated to the representation proceeding. See *Serv-U-Stores*, 234 NLRB 1143 (1978). That situation is not presented in this case.

[4] In that proceeding, in which the Respondent could have raised the supervisory issue, the burden would have been on the Respondent to prove supervisory status. *St. Alphonsus Hospital*, 261 NLRB 620, 624 (1982), enfd. 703 F.2d 577 (9th Cir. 1983).

[5] The Respondent cites, inter alia, *Nursing Center at Vineland*, 318 NLRB 901 (1995), enfd. 151 LRRM 2736 (3d Cir. 1996); and *NLRB v. International Health Care*, 898 F.2d 501 (6th Cir. 1990).

[6] The Respondent claims that several facts, including that the certification followed a stipulated election agreement rather than a hearing, distinguish the instant case from the precedent on which we rely. We do not agree. The *Pittsburgh Plate Glass* principle was not applied in *Oakland Press* because the union withdrew the representation petition before any ruling was rendered, not because there was no hearing.

The Respondent asserts that other facts—that no collective-bargaining agreement has been reached and the challenge to the certification comes "only five months into the certification year"—distinguish this case from the *Pittsburgh Plate Glass* precedent. We disagree. Timing is not a factor in applying the well-established rule of prohibiting the relitigation of issues in an 8(a)(5) proceeding that were or could have been litigated in the prior representation proceeding. In addition, we note that the courts have held that where, as here, "an employer honors a certification and recognizes and begins bargaining with the certified representative, it waives a contention that the election and certification are invalid," and therefore the employer in these circumstances cannot get judicial review of the underlying representation proceedings when the Board seeks enforcement of its bargaining order. *King Radio Corp. v. NLRB*, 398 F.2d 14, 20 (10th Cir. 1968), cited with approval in *Peabody Coal Co. v. NLRB*, 725 F.2d 357, 365 (6th Cir. 1984).

[7] In *Washington Post Co.*, 254 NLRB 168 (1981), on which the Respondent also relies, the Board allowed an employer to litigate a supervisory issue in a unit clarification proceeding even though the union had been certified after a representation proceeding in which the supervisory issue was not litigated. In that case, however, the Regional Director during the representation proceeding expressly authorized the parties to raise the supervisory issue by filing a unit clarification petition after the certification in exchange for the parties' agreement not to litigate the unit placement issue prior to the election. Here, the Respondent voluntarily abandoned its claim that LPNs were supervisors and stipulated to a bargaining unit of LPNs

spondent, by withdrawing recognition from and refusing to bargain with the Union because it had reconsidered the status of its LPNs and believed them to be supervisors, violated Section 8(a)(5) and (1).

CONCLUSION OF LAW

By withdrawing recognition from and refusing to bargain with the General Teamsters, Sales and Service and Industrial Union, Local 654, an affiliate of the International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative of employees in the bargaining unit, the Respondent has violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

The Charging Party has requested an appropriate extension of the certification year. We shall extend the certification year for 7 months, the period during the certification year in which the Respondent was under a duty to bargain but refused to do so. See *Colfor*, 282 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, I.O.O.F. Home of Ohio, Inc., Springfield, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from and refusing to bargain with the General Teamsters, Sales and Service and Industrial Union, Local 654, an affiliate of the International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize the Union on resumption of bargaining in good faith and for 7 months thereafter as if the initial year of certification had not expired.

(b) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All licensed practical nurses of the Employer at its Springfield, Ohio facility, excluding non-LPN personnel, supervisors, and guards as defined in the Act.

(c) Within 14 days after service by the Region, post at its Springfield, Ohio facility copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 26, 1995.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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without any authorization from the Regional Director to raise the supervisory issue post certification.

We are aware of only one case, *McAlester General Hospital*, 233 NLRB 589 (1977), in which the Board permitted an employer to litigate the supervisory status of certain registered nurses in a subsequent unit clarification proceeding despite their inclusion in the certified stipulated unit. We find the Board's action in that case inconsistent with the precedent discussed above, and we accordingly overrule it.

Member Higgins finds it unnecessary to overrule *McAlester*. In this regard, he notes that the Respondent herein stipulated that the entire unit of licensed practical nurses consisted of statutory employees. Thereafter, less than 5 months after the Union was certified, Respondent abruptly changed position and withdrew recognition, arguing that all of the unit LPNs were supervisors. In these circumstances, Member Higgins would not permit the issue of status to be raised. He finds it unnecessary to pass on the validity of *McAlester* where, about 1 year after the union's certification, the employer sought to clarify the unit to exclude a few persons.

Finally, the Respondent, pointing to the Board's procedural denial of its request for review of the Acting Regional Director's order in the unit clarification proceeding, claims that it has yet to receive a decision from the Board on the merits of the supervisory issue. As this decision makes clear, the Respondent's opportunity to litigate this issue was in the July 1994 representation proceeding. The Board's ruling on the request for review does not require otherwise.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT withdraw recognition from and refuse to bargain with the General Teamsters, Sales and Service and Industrial Union, Local 654, an affiliate of the International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize the Union on resumption of bargaining in good faith and for 7 months thereafter as if the initial year of certification had not expired.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All licensed practical nurses of the Employer at its Springfield, Ohio facility, excluding non-LPN personnel, supervisors, and guards as defined in the Act.

I.O.O.F. HOME OF OHIO, INC.